LIM SEAK HUAT

v.

MALAYAN UNITED REALTY SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-96 OF 1995]
12 AUGUST 1997

CIVIL PROCEDURE: *Preliminary objection - Whether it could be heard even though not advanced before Senior Assistant Registrar*

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Whether claim had reasonable cause of action - Whether case plain and obvious for striking out*

CIVIL PROCEDURE: *Appearance - Unconditional appearance - Whether defendant precluded from striking out plaintiff's claim*

LANDLORD & TENANT: *Renewal - Lease - Interpretation of terms of agreement*

The defendant had purchased the property in which the plaintiff was at that time living and proposed that the plaintiff moved into a similar property which was owned by the defendant. The plaintiff and the defendant thus entered into a tenancy agreement for a period of three years, in 1985. Two subsequent agreements were entered into on the same terms and conditions, except that each subsequent agreement showed an increase in the rental. The tenancy was continued until 1992. The plaintiff contended that the conditions as proposed by the defendant contained a perpetual renewal option ('option') but the defendant denied the existence of this clause.

The plaintiff brought an action against the defendant and the defendant then filed a summons-in-chambers to strike out the plaintiff's writ of summons and statement of claim ('encl 11') under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'), and/or under the inherent jurisdiction of the court pursuant to O. 92 r. 4 of the RHC. The motion was dismissed and the defendant appealed.

The plaintiff alleged that prior to the expiry of the 1992 agreement, the plaintiff wanted to exercise the option but the defendant refused to sign a new tenancy agreement unless the plaintiff agreed to waive the option clause. The defendant denied that there was an option clause in any of the three tenancy agreements and alleged that no fresh agreement had been reached between the

plaintiff and the defendant after the expiry of the 1992 agreement. The plaintiff sought to adduce oral evidence to prove the existence of an oral undertaking between the parties.

The defendant contended that the whole of the plaintiff's case rested on the plaintiff's alleged right to exercise a perpetual renewal option.

A preliminary objection was raised by the plaintiff who contended that the defendant's application for striking out was neither clear nor specific and argued that the ambiguity was further compounded by the defendant's failure to mention the specific, relevant rules *viz*, O. 18 r. 19(1)(a), (b), (c) or (d) of the RHC as well as the omission of the grounds the defendant was proceeding upon.

The question arose as to whether the plaintiff's statement of claim had a reasonable cause of action and whether the case was a plain and obvious case for striking out.

Held:

[1] Proviso (c) to s. 92 of the Evidence Act 1950 provides that the existence of an oral undertaking may be proved. In the present case, the plaintiff should be permitted in law to adduce evidence to prove the existence of an oral undertaking which could only be done at the trial proper.

[2] It is a well established principle that the summary power under Rules of the Supreme Court ('RSC') O. 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases. The summary jurisdiction of the court was not intended to be exercised by a minute and protracted examination of the documents and the facts of the case in order to ascertain whether the plaintiff really has a cause of action in considering the defendant's application for striking out. The court found that the statement of claim disclosed a reasonable cause of action and therefore the writ should not suffer the fate of being struck off.

[3] The effect of an unconditional appearance is said to be a waiver of any irregularity there may be and an entire submission to the jurisdiction of the court. In this instance, the defendant having entered an unconditional apperance and having filed the statement of defence was thus precluded from filing the application for striking out the writ and the statement of claim. The appropriate remedy would be to apply under O. 33 r. 2 of the RHC.

Obiter:

[1] Appeals from decisions of the registrar are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time. Thus it must be emphasised that although the preliminary objection was not advanced before the registrar, it could be advanced for the first time before the judge.

[Appeal dismissed.]

Cases referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(foll)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(cit)***

Brown v. Gould [1972] Ch 53 ***(cit)***

Buckland v. Papillon [1866] 2 Ch App 67 ***(cit)***

Caerphilly Concrete Products Ltd v. Owen [1972] 1 WLR 372 ***(refd)***

Dr Leela Ratos & Ors v. Anthony Ratos s/o Domingos Ratos & Ors [1996] 4 CLJ 33 ***(refd)***

Federal Construction Co (PG) Sdn Bhd v. Faridah binti Shaiful Yazan [1977] 1 MLJ 106 ***(cit)***

Ganesan & Anor v. Baskaran [1986] 2 MLJ 26 ***(cit)***

HL Bannerji v. Chin Cheng Realty (Pte) Ltd [1983] 1 MLJ 18 ***(refd)***

Hubbuck & Sons v. Wilkonson, Heywood & Clark Ltd [1899] 1 QB 86 ***(cit)***

Hyde v. Skinner [1723] 2 P Wms 196 ***(cit)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 ***(refd)***

King's Motors (Oxford) v. Lax [1970] 1 WLR 26 ***(cit)***

Letang Cooper [1965] 1 QB 232 CA ***(cit)***

Loh Holdings Sdn Bhd v. Penglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 FC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Berhad [1984] 2 MLJ 143 ***(cit)***

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 CLJ 257 ***(refd)***

Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(not foll)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(cit)***

Read v. Brown [1988] 22 QBD 128 ***(cit)***

Re Hopkin's Lease [1972] 1 All ER 248 ***(refd)***

Re Orr-Ewing 22 Ch D 463 ***(cit)***

Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 ***(refd)***

Sheldon v. Brown Bayley's Steel Works Ltd & Dawnways Ltd [1953] 2 QB 393 ***(cit)***
Tolhurst v. Associated Portland Cement Manufacturers [1903] AC 414 ***(cit)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(foll)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 ***(not foll)***
Zainal Abidin v. Century Hotel Sdn Bhd [1987] 1 MLJ 236 ***(cit)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
Rules of the Court 1980, O. 18 rr. 19(1)(a), (b), (c), (d), (2), O. 20 r. 8(1), O. 33 r. 2, O. 92 r. 4

Other sources reffered to:
Encyclopaedia of Forms and Precedents, 3rd edn, vol 8, p 230
The Inherent Jurisdiction of the Court [1970] Current Legal Problems 23, p 51

For the plaintiff - Ibrahim Hashim; M/s Hassan Ibrahim & Co
For the defendant - Goh Mey Foon; M/s Leng & Co

Reported by Anitha Rajaram

JUDGMENT

Abdul Malik Ishak J:

The defendant filed a summons-in-chambers in encl. 11 for striking out the writ of summons dated 11 April 1995 and the statement of claim dated 6 April 1995 as reflected in encl. 2. Generally, encl. 11 was to strike out encl. 2 under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court, which must surely be under O. 92 r. 4 of the RHC. Enclosure 11 was heard by the Senior Assistant Registrar ('SAR') who on 27 February 1997 delivered his decision by dismissing that enclosure forthwith. The defendant swiftly filed their appeal to the judge-in-chambers dated 27 February 1997 as reflected in encl. 21. The relevant enclosures for the hearing of encl. 11 were:

(i) Enclosure 10, the affidavit of Sin Tiew Cheo affirmed on 20 June 1995 for the defendant;

(ii) Enclosure 8, the affidavit of Lim Seak Huat that was affirmed on 4 July 1995 for the plaintiff;

(iii) Enclosure 13, the affidavit-in-reply of Sin Tiew Cheo affirmed on 8 August 1995 for the defendant;

(iv) Enclosure 6, the statement of defence dated 24 May 1995; and finally, not forgetting.

(v) Enclosure 2, the particulars of the writ of summons dated 11 April 1995 and the statement of claim dated 6 April 1995 thereof.

The facts garnered and distilled from these enclosures may compendiously be stated as follows:

> The plaintiff was, at all material times, the tenant of a shophouse known as No: 61, Jalan Ibrahim, Johor Bahru, a rent controlled premises ('Lot 61'). The defendant was, at all material times, the owner of two shophouses known as Lots 4 and 5, Jalan Trus, Johor Bahru, a de-controlled premises ('Lots 4 and 5'). Sometime in 1985, the defendant purchased Lot 61 and proposed that the plaintiff moved from Lot 61 to Lots 4 and 5. It was the plaintiff's stand that the considerations for such shifting as proposed by the defendant and accepted by the plaintiff were that:
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> (a) the defendant was to pay the plaintiff RM60,000;
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> (b) the plaintiff would be able to stay in Lots 4 and 5 as a tenant so long as the plaintiff likes and so long as the defendant does not propose to re-develop Lots 4 and 5; and
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> (c) the aforesaid terms be reduced in the form of a tenancy agreement for the letting of Lots 4 and 5 to the plaintiff for a term of 3 years coupled with a renewal option for another 3 years so long as the defendant was not re-developing Lots 4 and 5.

Now, according to the defendant a sum of RM70,000 was paid and a tenancy agreement dated 7 March 1985 ("the 1985 agreement") in respect of Lots 4 and 5 for a period of three years was entered into with the plaintiff. The agreed terms for shifting were incorporated and formed part of the 1985 agreement but the defendant denied the existence of the so-called "perpetual renewal option."

The 1985 agreement was followed by two further agreements of three years each respectively dated 29 August 1988 ("the 1988 agreement") and 24 February 1992 ("the 1992 agreement") which were executed between the plaintiff and the defendant *vis-a-vis* Lots 4 and 5.

It was an allegation by the plaintiff that prior to the expiry of the 1992 agreement, the plaintiff wanted to exercise the "perpetual renewal option" but the defendant refused to sign a new tenancy agreement unless the plaintiff agreed to waive the "perpetual renewal option" clause. The defendant vehemently denied that there was ever a "perpetual renewal option" clause in any of the tenancy agreements and alleged that no fresh agreement had been reached between the plaintiff and the defendant after the expiry of the 1992 agreement. The plaintiff sought under the statement of claim the following orders:

(a) Specific performance of the agreement in the terms of the defendant's original offer;

(b) The defendant to execute a tenancy agreement in the form of the 1992 agreement;

(c) Costs; and

(d) Any other order as the court may deem fit and suitable.

Striking Out

An argument was advanced by the defendant that the whole substratum of the plaintiff's case rested on the plaintiff's alleged right to exercise a "perpetual renewal option" in terms of the 1992 agreement particularly within the ambit and purview of cl. 5(c) which was worded as follows (as reflected at p. 12 of exh. "A" annexed to encl. 10):

> It is further agreed between the parties that at the expiration of this Tenancy Agreement the Tenant will be entitled to an option to renew the tenancy upon the same terms and conditions herein contained provided that the Landlord may increase the rental reserved herein up to a maximum of ten per centum (10%) only.

Flowing from this, a question arose whether the 1992 agreement, particularly cl. 5(c) thereof, conferred onto the plaintiff a perpetual option to renew the tenancy as contended by the plaintiff. If the answer was in the positive then the plaintiff was entitled to insist on signing the tenancy agreement on the same terms as the 1992 agreement within the ambit and purview of prayer (b) to the statement of claim. On the other hand, in the event the answer was in the negative then it follows that the plaintiff could not insist on executing the tenancy agreement in the form of the 1992 agreement and, consequently, since no tenancy agreement was entered into by the parties after expiry of the 1992 agreement which had expired on 31 May 1994, then the plaintiff cannot remain on Lots 4 and 5 after 31 May 1994 bearing in mind that the plaintiff filed the writ on 11 April 1995. The negative answer to the question posed would also mean that the plaintiff's claim was destined to fail and should be struck out, so submitted the defendant through their learned counsel one Miss Goh Mey Foon.

Interpretation Of Cl. 5(c) Of The 1992 Agreement

It is germane to now embark on the interpretation of cl. 5 (c) of the 1992 agreement. For this exercise reference may be made to the case of *Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 FC where the old Federal Court had occasion to construe cl. 4(e) of the lease agreement that was worded in this way (see p. 245 para. G to H):

> ... then the Lessors will grant to the Lessee a lease of the demised premises for a further term of ten (10) years from the expiration of the said term at the same rent and containing the like covenants and provisoes as are herein contained ...

In that case the lessor held onto the notion that the lessee was only entitled to a second lease for 10 years without inclusion of the covenant for renewal but the lessee disagreed and insisted that by cl. 4 (e), the lessee was entitled to a perpetual covenant for renewal. The old Federal Court held that the words "... containing the like covenants and provisoes as are herein contained ..." constituted a general covenant and such words without more were said to be far from clear and fell short of the legal requirement to confer what in effect would amount to a perpetual lease by means of perpetual renewals. Mohamed Azmi FJ in delivering the judgment of the old Federal Court applied vigorously the judgment of Russell LJ in *Re Hopkin's Lease* [1972] 1 All ER 248, 251; [1972] 1 WLR 372, 394 to the following effect:

> The approach to the question whether a lease is perpetually renewable is not in doubt. The language used must plainly lead to that result, although the fact that an argument is capable of being sustained at some length against that result does not of course suffice.
>
> As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease, the courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, totidem verbis, and so on perpetually. The reference to the same covenants was construed as not including the option covenant itself. This limited the tenant's right to one renewal. In order, therefore, to make it plain that the covenants to be contained in the second lease (to be granted under the exercise of the option to renew) were to include also the covenant to renew, draftsmen were accustomed to insert phrases such as 'including this covenant', so as to achieve a perpetually renewable lease. As I have indicated, if they did not do this, the second lease would not contain any option clause. The operation of the words of inclusion was not limited to requiring the second lease to contain a covenant to renew once more only, which would have been the outcome if the words of inclusion had been omitted in the second lease. This was because the words of inclusion could not properly be construed as requiring the second lease to contain the same covenants other than the covenant to renew but additionally to include an option to renew once more only – a total of three terms. The words of inclusion defined or explained what was meant by 'the same covenants', that is to say, as including the covenant to renew. Consequently in the second lease, in order to comply with the words of definition or explanation, the covenants referred to therein to be contained in the second lease must contain the same wording including the inclusion.

Mohamed Azmi FJ took into account the *Encyclopaedia of Forms and Precedents* 3rd Edn, vol. 8 at p. 230 of cl. 3 in delivering the judgment of *Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd (supra)* and noted that the example given in cl. 3(2) thereof "if completely followed would have made it very clear with no ambiguity whatsoever that cl. 4(e) could not confer perpetual renewal, because of the expressed words of exclusion." His Lordship then continued to say that "if an 'inclusive phrase' had been used such as in *Re Hopkin's Lease (ante) viz.* '... grant to him a lease of the said demised land for the further term of five years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisoes as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof) ...', then there could be no doubt that the lease would confer the right to perpetual renewal ... ." In serious vein, Mohamed Azmi FJ in the same case said at p. 246 para. D of the report:

> The established principle is that the court leans against a construction for perpetual renewal, unless clearly intended, and in discovering such clear intention, the legal instrument should not be construed by the acts of the parties (see *Baynham v. Guy's Hospital* [1796] 3 Vesey Jr. 295-299; 30 ER 1019).

On the basis of the words employed therein, Mohamed Azmi FJ in the same case came to the conclusion that the trial judge was correct, in holding on the true construction of cl. 4(e) of the lease agreement, that it did not confer on the lessee the right to perpetual covenant for renewal. And that the words used in cl. 4(e) of the lease agreement were:

> In the absence of explanatory words, ... stood as mere legal jargon creating no right whatsoever to perpetual lease.

Going across the ocean, I note with alacrity that the English Courts have taken the stringent view that if the clause for renewal states that the new lease shall contain the same covenants and provisions as are contained or incorporated in the old lease, a literal interpretation must not be adopted, as it would result in the tenancy becoming perpetually renewable (*Caerphilly Concrete Products Ltd v. Owen* [1972] 1 WLR 372). It was said that such a clause must be construed in such a way as not to include the renewal clause itself, so as to limit the tenant to only one right of renewal. Thus, in order to obtain a perpetually renewable lease, the renewal clause must be precisely drafted so as to clearly include the covenant to renew. This requirement was in fact satisfied in *Caerphilly Concrete Products Ltd v. Owen (supra)* where the renewal clause provided that on the written request of the tenant, a lease for a further term of five years would be granted to him "at the same rent and containing the like covenants and provisos as are herein contained (including

an option to renew such lease for a further term of five years at the expiration thereof)". The court there held that this created a perpetually renewable lease.

It must be emphasised that the option must be clearly phrased and not ambiguous, otherwise it will be void for uncertainty. Put differently, the rental and the terms and conditions that will apply to the new lease must not be ambiguous. A classical example of an ambiguous option would be where the option provided that the renewed lease was to be "at a rent to be agreed" it was held that it was void for uncertainty (*King's Motors (Oxford) v. Lax* [1970] 1 WLR 26). The then Supreme Court in *Zainal Abidin v. Century Hotel Sdn Bhd* [1987] 1 MLJ 236 had occasion to interpret a tenancy for three years with an option for renewal "at a rent to be agreed upon" and their Lordships held that such a clause was void for uncertainty where the parties had not agreed on the new rent. However, in a situation where the agreed rent was expressed to be the "market rent" it was held that the court could determine what the market rent was (*Brown v. Gould* [1972] Ch. 53). In theory the benefit of an option may be assigned (*Tolhurst v. Associated Portland Cement Manufacturers* [1903] AC 414 at p. 423) but in practice this may be restricted by an express provision that it may be exercisable only by the original lessee. It is obvious that upon the death of the lessee, the option to renew will devolve upon his personal representatives (*Hyde v. Skinner* [1723] 2 P. Wms 196) and, on the lessee's bankruptcy, will vest in his trustee in bankruptcy (*Buckland v. Papillon* [1866] 2 Ch. App. 67).

In *H.L. Bannerji v. Chin Cheng Realty (Pte) Ltd* [1983] 1 MLJ 18; [1983] 2 MLJ 18 (CA); [1985] 2 MLJ 341 (PC), a lease containing an option for renewal "at the same rent and containing the like covenants and provisos as are therein contained, including the present covenant for renewal" was held to be a perpetually renewable lease. It is germane to mention that *Bannerji's* case contained the words "including the present covenant to renew". But, in the event the renewal clause provided that the lessor would grant to the lessee a further term at the same rent and "containing the like covenants and provisoes as herein contained", the Federal Court in *Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd (supra)* ruled that these words constituted a general covenant and, without more, they were far from clear and fell short of the legal requirement to confer a perpetually renewable lease.

Using *Bannerji's* case as a leverage, it was argued that cl. 5(c) in the 1992 agreement did not confer on the plaintiff a perpetually renewable option. The plaintiff, it was submitted, should not insist on signing a tenancy agreement in the same form as the 1992 agreement and, consequently, the statement of claim was bound to fail and should be struck out.

All the authorities show the agility of the judges to construe tenancy agreements according to well defined principles. But construction being a subjective area, it would accordingly vary from judge to judge and would also be dependent on the surrounding facts and circumstances. In short, in construing cl. 5(c) to the 1992 agreement it would entail differences of opinions between judges themselves. Judges are not impotent, incapable and sterile. On the contrary, they are robust, practical, and realistic. Judges no longer wring their hands and say: "There is nothing we can do about it." Judges can and should use their wealth of experience and knowledge to adjudicate on complex legal matters. It is within the domain of judges to deliberate on issues of the day till doomsday.

I pause here to take stock of the situation. In the recent case of *Pengiran Othman Shah bin Pengiran Mohd. Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, the Court of Appeal had occasion to say something about Order. Order 18 r. 19 of the RHC. Siti Norma Yaakob JCA delivering the judgment of the Court of Appeal had this to say at p. 320 of the report:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890).
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> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

The Preliminary Objection

This brings me to the preliminary objection advanced by Mr. Ibrahim Hashim, the learned counsel for the plaintiff, to the effect that the defendant's application for striking out in encl. 11 was unclear and far from specific. That ambiguity was said to be compounded by the defendant's failure not only to mention in encl. 11 the specific relevant rules, namely, O. 18 r. 19(1)(a), (b), (c) or (d) of the RHC but also on which grounds the defendant was proceeding upon.

Enclosure 11 was worded thus:

> (a) Menurut A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau menurut kuasa-kuasa sedia ada Mahkamah yang menyatakan bahawa Writ Saman No: 22-96-1995 dan Penyataan Tuntutan bertarikh 6 April 1995 di dalam kes ini dibatalkan atas alasan-alasan bahawa Writ Saman dan Penyataan Tuntutan tersebut:
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> (i) tidak mendedahkan apa-apa kuasa tindakan yang munasabah;
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> (ii) adalah mengaibkan, remeh atau menyusahkan;
>
> (iii) mungkin menjejaskan, menghalang atau melenggahkan perbicaraan tindakan ini dengan adil; atau
>
> (iv) selainnya adalah suatu pen- yalahgunaan proses Mahkamah.

At p. 1 of encl. 11, the grounds relied upon were "dibatalkan atas alasan-alasan ... (i), (ii), (iii) or (iv)." Whereas at p. 2 of encl. 11, different grounds were advanced, to wit, "Alasan-alasan permohonan ini adalah bahawa plaintif tidak mempunyai kuasa (kausa) tindakan terhadap defendan kerana tuntutan plaintif yang berdasarkan kepada suatu perjanjian yang tidak memperuntukkan opsyen pembaharuan tenansi yang kekal." Further down the same paragraph of p. 2 of encl. 11, other grounds were also advanced by the use of these words: "... dan alasan-alasan seperti yang dinyatakan dalam afidavit oleh Sin Tiew Cheo yang di ikrarkan pada 20.6.95 dan difailkan di sini."

It was argued that these grounds were ambiguous and nebulous as it placed the plaintiff in an embarrassing position to answer encl. 11. I did say in *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775 especially at p. 778 that:

> The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v. Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582; *R v. Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O. 18 r. 19(1)

> of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC.

The failure to be specific was said to have prejudiced the plaintiff in preparing the case fairly and squarely to answer the defendant's drastic and summary application for striking out the plaintiff's statement of claim.

It is undeniable that the draftsman that prepared encl. 11 was not well versed with the RHC. As Kamalanathan Ratnam JC said in *Dr. Leela Ratos & Ors v. Anthony Ratos s/o Domingos Ratos & Ors* [1996] 3 MLJ 167 at p. 180 of the report:

> It does not behove an applicant to be vague and ambiguous in his application as to the prayers he wants, and to rely on such prayers on matters averred to in his affidavit. An affidavit is to support the application, not *vice versa*.

It was submitted that when the SAR dismissed encl. 11 it was on the footing that no affidavit evidence was admissible in respect of an application under O. 18 r. 19(1) (a) of the RHC read with r. 19(2), O. 18 of the RHC. I must say that what the SAR did was perfectly correct. But, it was submitted, that the SAR failed to appreciate that the defendant was also relying on the other grounds mentioned in O. 18 r. 19(1) of the RHC, namely, (b), (c) or (d); and/or the inherent jurisdiction of the court. In short, it was argued that the SAR should have considered the affidavit evidence when confronted with an application under O. 18 r. 19(1) (b), (c) or (d) of the RHC and under the inherent jurisdiction of the court. Indeed this was a correct assertion of the law. In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 SC, the then Supreme Court held at p. 17 of the report, particularly the headnote thereto that:

> The High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 of the Rules of the High Court 1980 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

It was for this reason that the then Supreme Court embarked on an examination of the available evidence. This was what Peh Swee Chin SCJ (now FCJ) said at p. 22 of the report:

> It is to be borne in mind that it is the sole function of the court to construe a document with a view to finding the intention of the parties. The function is in reality to find the meaning of the words, for such meaning is equivalent to such intention of the parties for the purpose of interpretation. Please see a similar observation in *Shore v. Wilson* [1942] AC & F 355 HL.

Recently in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, Gopal Sri Ram JCA, speaking for the Federal Court said at p. 122 of the report:

> Now, we must say at once that we are unable to agree with the approach taken by the learned judge. It is plain that he overlooked the fact that the company was moving the court, not only under para. (a) of O. 18 r. 19(1), but was also relying on the other paragraphs of that rule and upon the court's inherent jurisdiction. That this is indeed the true position may be gathered from the words of the first prayer in the motion which uses the language appearing in paras. (b), (c) and (d) of the first sub-rule. Sub-rule 2 of O. 18 r. 19 prohibits the use of affidavit evidence and confines the court to four corners of a pleading only in applications made under para. (a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under the other paragraphs of the first sub-rule or under the inherent jurisdiction of the court. See *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British American Life & General Insurance Bhd* [1993] 3 MLJ 16.
>
> In deciding to exclude from his consideration relevant and admissible evidence, the learned judge, apart from misdirecting himself on the correct legal principles, certainly failed to take into account relevant considerations. His decision on the merits of the application before him cannot therefore be treated as being unimpeachable on appeal.

In the same vein, I did say in *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor (supra)* at p. 777 of the report:

> My understanding of *Wenlock v. Moloney (supra)* when translated to the issue at hand is this: applications for striking out pleadings on grounds (b) or (c) or (d) of O. 18 r. 19(1) of the RHC or for that matter as stated in encl. 49 where the inherent jurisdiction of the court is invoked, affidavit evidence may and will ordinarily be used. All the facts will be considered and the affidavits as to the facts of the whole case would also be admissible when the application is grounded on the inherent jurisdiction of the court: *Willis v. Earl Howe* [1893] 2 Ch. pp. 551, 554; *Vinson v. The Prior Fibres Consolidated Ltd* [1906] WN 209; *Norman v. Matthews* [1916] 85 LJ KB 857 and on appeal it was reported in [1916] WN 133; *Remmington v. Scoles* [1897] 2 Ch. 1.

The sum total of these authorities lay down the principle that when an application is made to the inherent jurisdiction of the court, all the facts can be looked into and the affidavits as to the facts are admissible in evidence.

The scope of inherent jurisdiction is wide. As Edgar Joseph Jr. SCJ (now FCJ) said in *Pacific Centre Sdn Bhd v. United Engineers (M) Berhad* [1984] 2 MLJ 143 at p. 147:

> ... It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfill itself as a court of law, to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner': *Jacob, The Inherent Jurisdiction of the Court* – [1970] 23 Current Law Problems, 23, 27 and 28.

In defining inherent jurisdiction, Sir Jack Jacob QC the former Senior Master of the Supreme Court in the United Kingdom, in his article "*The Inherent Jurisdiction of the Court*", [1970] *Current Legal Problems* 23 said at p. 51:

> ... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them.

It must be emphasised that although the preliminary objection was not advanced before the SAR it could still be advanced for the first time before me. This point was amply ventilated by Edgar Joseph Jr. FCJ, in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 FC especially at p. 248 of the report:

> With respect in appeals to a judge in chambers from the decision of a Registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the Subordinate Courts. Such appeals from decisions of the Registrar are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v. Rimmer* [1971] 1 All ER 1072 [1976]:
>
> > I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans v. Bartlam* and in the notes in *The Supreme Court Practice*, 1970 at p. 759 para. 58/1/2, p. 762 para. 58/4/1, under RSC O. 58 rr. 1 and 4.

> In *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at 106, the Supreme Court, had occasion to refer to the above passage in the judgment of Payne J with approval.

In my judgment, the preliminary objection though taken for the first time before me was duly considered and on the authorities of *Tractors Malaysia Bhd v. Tio Chee Hing (supra)*; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British American Life & General Insurance Bhd (supra)* and *Owen Sin Liang Khui v. Piasau Jaya Sdn Bhd & Anor (supra)* the affidavit evidence too was considered, being relevant and admissible, in deliberating encl. 21.

Some Cause Of Action

Mr. Ibrahim Hashim, the learned counsel for the plaintiff, argued that the power to summarily strike out a pleading must be sparingly exercised. He relied on the passage appearing in the judgment of Mohamed Dzaiddin bin Hj. Abdullah SCJ (now FCJ) in the case of *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 2 AMR 34: 1969 particularly at p. 1976 where his Lordship said:

> This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided, by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA; *Wenlock v. Moloney (supra)*).

Diplock LJ defined cause of action in *Letang Cooper* [1965] 1 QB 232 CA as:

> ... simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

Lord Esher in *Read v. Brown* [1988] 22 QBD 128 defined the phrase to mean every fact, though not every piece of evidence, which was necessary for the plaintiff to prove, if traversed, to support the plaintiff's right to the judgment of the court.

Now, the question to pose would be this: Was there some cause of action shown by the plaintiff, however weak, or some question fit to be decided by this court? For this exercise, I need to examine the surrounding circumstances and the factual background of the case (*Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd (supra)*). There were three tenancy agreements executed by the parties, namely, the 1985 agreement, the 1988 agreement and

the 1992 agreement which were marked as exhs. "A", "B" and "C" respectively in encl. 8 thereof. The salient terms and conditions of these three tenancy agreements may be summarised as follows:

(i) The 1985 agreement

Term: 3 years (1.4.85 to 30.3.88).

Rent: RM150

Clause 5(c): It is further agreed between the parties that at the expiration of this Agreement, the Tenant will be entitled to an option to renew the tenancy upon the terms and conditions herein contained in the event the landlord does not require the demised premises for redevelopment or renovation or in the event the Landlord does not intend to sell the demised premises.

(see p. 9 of exh. "A" to encl. 8).

(ii) The 1988 agreement

Term: 3 years (1.6.88 to 31.5.91).

Rent: RM250

Clause 5(c): It is further agreed between the parties that at the expiration of this Tenancy Agreement the Tenant will be entitled to an option to renew the tenancy upon the same terms and conditions herein contained in the event the Landlord does not require the demised premises.

(see p. 11 of exh. "B" to encl. 8).

(iii) The 1992 agreement

Term: 3 years (1 June 1991 to 31 May 1994).

Rent: RM350

Clause 5(c): It is further agreed between the parties that at the expiration of this Tenancy Agreement the Tenant will be entitled to an option to renew the tenancy upon the same terms and conditions herein contained provided that the Landlord may increase the rental reserved herein up to a maximum of ten percentum (10%) only.

(see p. 12 of exh. "C" of encl. 8).

It is interesting to note that in his statement of claim the plaintiff claimed that each of the three tenancy agreements contained a perpetual renewal option clause. Paragraphs 6, 7 and 8 of the statement of claim should be referred to and these were worded as follows:

> 6. These terms were subsequently reduced in writing in the form of a tenancy agreement dated 7 March 1985 for a period of three years at a rental of RM150.00 per month together with an expressed perpetual renewal option clause.
>
> 7. When the agreement dated 7 March 1985 expired, a similar agreement was signed on 29 August 1988 together with an expressed perpetual renewal option clause, but the rental was increased to $250 per month.
>
> 8. When the 29 August 1988 agreement expired, a similar agreement was signed on 24 February 1992 together with an expressed perpetual renewal option clause, but the rental was increased to $350 per month.

It was the defendant's stand that the three tenancy agreements were not governed by the "perpetual renewal option" clauses because the rentals were increased at the end of each of the three tenancy agreements. The 1992 agreement was also differently worded for it provided for an increase of rent subject to the maximum of ten per centum (10%) only. It was also pointed out that there was no tenancy agreement covering the period between 31 March 1988 (the day after the expiry of the 1985 agreement) and 30 May 1988 (the day prior to the commencement date of the 1988 agreement). Flowing from this, it was argued that if a perpetual renewal option was actually intended and granted to the plaintiff, there should not have been a break in the tenancy period. It was also said that each of the three tenancy agreements was independent from one another and that the existence of each tenancy agreement was not the result of the exercise of the so called perpetual renewal option. Had it been a perpetual renewal option clause, the terms and conditions of all the three tenancy agreements would exactly be the same and there would not be a variation in the amount of monthly rent payable, so submitted Miss Goh Mey Foon for the defendants.

A perusal of the 1992 agreement revealed the following state of affairs. Clause 1 of the 1992 agreement states that the tenancy was for a period of three years commencing on 1 June 1991 and expiring on 31 May 1994. Clause 3(k) of the 1992 agreement requires the plaintiff to yield up Lots 4 and 5 with the fixtures and fittings thereto in good and tenantable repair and condition – of course fair wear and tear excepted. Now, if a perpetual tenancy was in fact intended, the plaintiff would not be required to re-deliver to the defendant vacant possession of Lots 4 and 5 upon the expiry of the 1992 agreement.

Incidentally, it is germane to note that all the three tenancy agreements were executed by the plaintiff in the presence of solicitors and there was thus, so it was submitted, no confusion as to what the plaintiff was entitled to under those tenancy agreements.

Next, it was argued that the plaintiff was not entitled to adduce oral evidence to prove that the defendant had granted to him a perpetual renewal option in the light of the clear terms of the tenancy agreements that had been reduced in writing. It was argued that ss. 91 and 92 of the Evidence Act 1950 would bar oral evidence between the parties for the purpose of contradicting, varying, adding to or substracting the terms of the 1992 agreement unless it was caught under one of the provisos. It was the defendant's stand that none of the provisos apply to the factual matrix of the present case. In *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 FC, the old Federal Court ruled that the respondents there should not be allowed to introduce oral evidence to contradict the terms of the contract. Salleh Abas FJ delivering the judgment of the old Federal Court had this to say (at p. 125 of the report):

> We feel that this course of action is not open to the respondents, as it is clear that under s. 92 of the Evidence Act 1950, oral evidence to contradict, vary, add to or substract from, the terms of any contract, grant or other disposition of property which has been reduced in writing is not admissible. The sales invoice and the delivery note being the contract reduced in writing between the appellants and the respondents s. 92 therefore applies.

In *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241 FC, the lease was in writing and it provided for the possibility of renewal by written request. When the lease expired the respondent only delivered part of the premises and in his defence to a claim of possession by the appellant alleged that there was an oral agreement for a new lease. The old Federal Court held that the alleged oral agreement could not be admitted as it would be contrary to s. 92 of the Evidence Act 1950. It was also held that the point raised by the respondent as to the existence of the oral agreement to renew the lease was not an arguable case, as it was neither effective nor admissible and therefore, it did not constitute a triable issue.

On these authorities, the defendant took the stand that in the event the plaintiff sought to introduce oral evidence to prove the existence of an oral agreement to renew the tenancy agreement perpetually, that would not be admissible as it would run counter to ss. 91 and 92 of the Evidence Act 1950.

An argument was advanced that even if the plaintiff were to allege that there was an oral agreement that gave the right to the perpetually renewable option, the plaintiff could not rely on that oral agreement as it was clearly unsupported by any consideration. Reliance was placed on the case of F*ederal Construction Co. (PG) Sdn Bhd v. Faridah binti Shaiful Yazan* [1977] 1 MLJ 106 FC, particularly the passage in the judgment of Gill FJ to the following effect:

> It is clear that the defendant was let into possession of the premises under the tenancy agreement so that her right to remain on the premises, if any, flowed entirely from that agreement. Quite clearly she was not let into possession of the premises by virtue of the alleged oral agreement under which she claimed that the plaintiffs had agreed to sell her the premises. We may add that in our view the defendant could not rely upon the oral agreement which was clearly not supported by any consideration.

For these reasons, the defendant strenously argued through Miss Goh Mey Foon that the appeal in encl. 21 should be allowed with costs. She submitted that the issue involved was purely a question of interpretation. Striking out the writ of summons and the statement of claim would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial as eventually, so submitted Miss Goh Mey Foon, the court was required to interpret cl. 5(c) of the 1992 agreement and that such interpretation could easily be decided without the need for a full trial. That was an interesting proposition.

Proviso (c) to s. 92 of the Evidence Act 1950 should be referred to and for clarity it is now reproduced hereinunder:

> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Briefly, proviso (c) to s. 92 of the Evidence Act 1950 clearly provides that the existence of an oral undertaking may be proved. What matters is that the plaintiff is permitted in law to adduce evidence to prove the existence of such a promise (*Ganesan and Anor v. Baskaran* [1986] 2 MLJ 26 (SC)). In the context of the present case, it can only be done at the trial proper. It is interesting to note that para. 9 of the statement of claim makes reference to a perpetual tenancy. It merits reproduction:

> Prior to the expiry of 24 February 1992 agreement the plaintiff wanted to exercise the perpetual renewal option but the defendant refused to sign a new tenancy agreement unless the plaintiff agreed to waive the perpetual renewal option, which the plaintiff refused.

In their statement of defence, the defendant denied para. 9 of the statement of claim. Thus, to summarily strike out the statement of claim without giving the plaintiff an opportunity to proceed to trial would be perverse and against the administration of justice. It is to do justice between the parties that a trial should take place before this court. Paragraph 9 of the statement of claim would cut through s. 92 of the Evidence Act 1959 and makes the whole issue of perpetual tenancy triable.

Miss Goh Mey Foon submitted that in the event encl. 11 was not specific and should be struck out she sought leave of this court to amend encl. 11 by deleting paras. (a)(i), (a)(ii), (a)(iii) and to retain para. (a)(iv) so as to proceed with the hearing of the appeal. It was her submission that such an amendment will not prejudice the plaintiff and was allowable under O. 20 r. 8(1) of the RHC which reads as follows:

> For the purpose of determining the real question in controversy between the parties to any proceedings, the court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct and from its tenor it is obvious that it deals more generally with the power of the court to order any document other than a judgment or order to be amended. In *Ismail bin Ibrahim and Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 it was held that the rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. Mr. Ibrahim Hashim rightly argued that an attempt to amend, at this juncture, encl. 11 was nothing more than a tactical manoeuvre and his Lordship Mohamed Dzaiddin J (now FCJ) in *Ismail bin Ibrahim and Ors v. Sum Poh Development Sdn Bhd & Anor (supra)* disallowed the application of the plaintiffs' there for leave to amend their pleadings with costs. It was strenously argued that an informal application to amend encl. 11 should not be entertained by this court. It was impressed upon me that the plaintiffs in *Ismail bin Ibrahim and Ors v. Sum Poh Development Sdn Bhd & Anor (supra)* applied formally for leave to amend their writ of summons indorsed with the statement of claim under O. 20 r. 5(1) of the RHC. Dispensation of a formal application for leave should not be allowed, so submitted Mr. Ibrahim Hashim. An analogy can be drawn from the case of *Semenanjong Trading Co. v. Teoh Cheng Hock* [1963] 29 MLJ 89 where the plaintiff there sought to amend the statement of claim in the midst of an application by the defendant to strike out the statement of claim. Counsel for the plaintiff in that case gave an undertaking to apply for leave to amend the statement of claim within a specified time. Hepworth J agreed and this was what his Lordship said at p. 91 of the report:" Subject to the plaintiff applying for leave to amend the statement of claim within 21 days from today there will be no order on the summons, except that the costs of and incidental to this application shall be taxed and paid by the plaintiff to the defendant.

I agree with Mr. Ibrahim Hashim that there should be a formal application to amend encl. 11. This was my judgment and I so hold accordingly. But as I said earlier this did not bar me from hearing encls. 11 and 21 particularly on the ground of an abuse of the process of the court (O. 18 r. 19(1)(d) of the RHC) and on the inherent jurisdiction of the court.

It was ingeniously argued by Mr. Ibrahim Hashim that the issue of perpetual tenancy that arose under the "perpetual renewal option" clause was per se a triable issue that would give rise to a reasonable cause of action. As Wan Suleiman FJ said in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 FC especially at p. 109 of the report:

> It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v. Peat Marwick & Mitchell* [1967] 1 MLJ 87. We need only refer to a passage from another authority referred to by learned counsel, the Privy Council decision in *Rediffussion (Hong Kong) Ltd v. Attorney General of Hong Kong* [1970] AC 1136:
>
> > It is well established principle that the summary power under RSC O. 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases ... No evidence is admissible on a cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ ...
>
> Counsel therefore submitted that it was premature for the judge to hold that the claim against defendants is bad because there is no cause of action.

Tied up with the issue of reasonable cause of action is the question of the merits of the plaintiff's claim. In considering the defendant's application for striking out, I should not be concerned with the success of the plaintiff's suit *(Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd (supra))*. I have perused through the pleadings and the relevant affidavits and I must at once say that the statement of claim disclosed a reasonable cause of action and it should not suffer the fate of being struck off. This was not a plain and obvious case that a judge can say at once that the statement of claim "as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for" (Lindley MR in *Hubbuck & Sons v. Wilkonson, Heywood and Clark Ltd* [1899] 1 QB 86, 91). I am mindful of the fact that the summary jurisdiction of the court was not intended to be exercised by a minute and protracted examination of the documents and the facts of the case in order to ascertain whether the plaintiff really has a cause of action.

There is one other matter that should be addressed. It is this. The defendant filed their unconditional appearance on 8 May 1995 as reflected at encl. 4. The summons-in-chambers for striking out in encl. 11 was dated 23 June 1995 and it was filed on the same date. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 SC, speaking for the then Supreme Court had occasion to remark on filing an unconditional appearance in relation to an O. 18 r. 19 of the RHC's application. This was what his Lordship said:

> It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded.

Applying this short principle of law to the facts of the present case, the defendant having entered an unconditional appearance on 8 May 1995 and having filed the statement of defence on 24 May 1995 was thus prevented from filing encl. 11 on 23 June 1995.

Now, what is the effect of an unconditional appearance? It is said to be a waiver of any irregularity there may be and an entire submission to the jurisdiction of the court (*Sheldon v. Brown Bayley's Steel Works Ltd & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 CA; and R*e Orr-Ewing* 22 Ch. D. 463).

To sum up, I dismissed encl. 21 with costs for the following main reasons:

(1) The defendant failed to show that the plaintiff's statement of claim had no reasonable cause of action.

(2) The defendant failed to show that it was a plain and obvious case for striking out.

(3) Proviso (c) to s. 92 of the Evidence Act 1950 would apply and the case should proceed to trial.

(4) The defendant was precluded from filing the application for striking out the writ and the statement of claim as they had entered an unconditional appearance and that the appropriate remedy would be to apply under O. 33 r. 2 of the RHC.

An ancillary order was also made and that was to expedite the hearing of the suit.